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Report of the Working Group on Arbitration on the work of its thirty-sixth session (New York, 4-8 March 2002)

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* The document's late submission is due to the Working Group's decision to adopt the final portion of the report (paras. 77-94) by electronic mail exchange after the close of the session.

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Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para . 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para . 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the

requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7] At its thirty-fifth session (Vienna, 19-30 November 2001), the Working Group approved the final version of the draft provisions in the form of a draft model law on international commercial conciliation. The report of that session is contained in document A/CN.9/506. The Working Group noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session.

6. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.113, paras. 13 and 14) and a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (ibid., para. 16). Consistent with a view expressed in the context of the thirty-fourth session of the Working Group (A/CN.9/487, para. 30), concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical circumstances, it was the agreement of the parties to arbitrate that should be required to be made in a form that was apt to facilitate subsequent evidence of the intent of the parties. In response to that concern, it was generally felt that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable right provision of article VII of the New York Convention.

7. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration and the text of paragraph 1 (a) (i) of a draft new article prepared by the Secretariat for addition to that Model Law (A/CN.9/WG.II/WP.113, para. 18). The Working Group was requested to continue its work on the basis of revised draft provisions to be prepared by the Secretariat.

8. The Working Group on Arbitration was composed of all States members of the Commission. The session was attended by the following States members of the

Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Romania, Russian Federation, Singapore, Spain, Sweden, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, and United States of America.

9. The session was attended by observers from the following States: Argentina, Australia, Bangladesh, Belarus, Croatia, Cyprus, Czech Republic, Egypt, Finland, Iraq, Ireland, Malta, Nigeria, Peru, Philippines, Poland, Portugal, Republic of Korea, Slovakia, Switzerland, Turkey and Venezuela.

10. The session was attended by observers from the following international organizations: Central American Court of Justice, Hague Conference on Private International Law, International Cotton Advisory Committee (ICAC), NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, American Bar Association, *Comité Maritime International*, Latin American Banking Federation, Global Centre for Dispute Resolution Research, Inter-American Commercial Arbitration Commission (IACAC), International Chamber of Commerce (ICC), International Law Institute, Lagos Regional Centre for International Commercial Arbitration, the London Court of International Arbitration (LCIA), Queen Mary (University of London) School of International Arbitration, *Union Internationale des Avocats*, The Chartered Institute of Arbitrators and U.S.-Mexico Conflict Resolution Centre.

11. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Mr. Koichi MIKI (Japan).

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.117) and two notes by the Secretariat discussing the issues of the written form for the arbitration agreement (A/CN.9/WG.II/WP.118), and interim measures of protection (A/CN.9/WG.II/WP.119).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on written form for arbitration agreements and on interim measures of protection.
4. Other business.
5. Adoption of the report.

I. Deliberations and decisions

14. The Working Group discussed agenda item 3 on the basis of the documents prepared by the Secretariat (A/CN.9/WG.II/WP.118 and 119). The deliberations and conclusions of the Working Group with respect to that item are reflected below in Chapters II and III. The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for continuation of the discussion at a later stage.

15. With regard to the requirement of written form for the arbitration agreement, the Working Group considered the draft model legislative provision revising article 7(2) of the Model Law on Arbitration (A/CN.9/WG.II/WP.118, para. 9). The Secretariat was requested to prepare a revised draft provision, based on the discussion in the Working Group, for consideration at a future session. The Working Group also discussed a draft interpretative instrument regarding article II(2) of the New York Convention (ibid., paras. 25-26). The Working Group acknowledged that it could not, at the present stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group was agreed that it would be useful to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a "friendly bridge" between the new provisions and the New York Convention, pending a final decision by the Working Group on how best to deal with the application of article II(2) of the Convention.

16. With regard to the issues of interim measures of protection, the Working Group considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74). The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. Due to lack of time, a revised draft of a new article prepared by the Secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (ibid., para. 83) was not considered by the Working Group.

17. It was noted that, subject to a decision to be made by the Commission at its forthcoming session, the thirty-fifth session of the Working Group was scheduled to be held from 7 to 11 October 2002 at Vienna.

II. Requirement of written form for the arbitration agreement

A. Model legislative provision on written form for the arbitration agreement

18. The draft model provision was as follows:

"Article 7. Definition and form of arbitration agreement

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

"(2) The arbitration agreement shall be in writing. 'Writing' includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.

"[(3) 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.]

"(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

"(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

"(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

"[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]"

Paragraph (1)

19. It was pointed out that paragraph (1), which reproduced the unchanged text of paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law on Arbitration") encompassed, in its second sentence, two types of arbitration agreements: an agreement in the form of an arbitration clause in a contract or as a separate agreement. The provision itself was not felt to create controversy. Nevertheless, it was suggested that the Working Group might need to review and, if required, revise the current formulation of the second sentence so as to align it with the substance of paragraph (4). It was said, in particular, that paragraph (4) implicitly made a distinction between an arbitration agreement, on the one hand, and the terms and conditions of the arbitration or its governing rules, on the other hand. Paragraph (4) thus appeared to cover situations that did not fall strictly under either of the types of arbitration agreement mentioned in paragraph (1).

20. The Working Group approved the substance of paragraph (1) and, having taken note of the comments made thereon, decided to revert to them after it had considered paragraph (4).

Paragraph (2)

21. The Working Group considered various comments and proposals, of both substance and form, in connection with paragraph (2). The substantive comments raised by the provision were essentially concerned with the relationship between the notions of "record" and "data message" and the interplay among paragraphs (2), (3) and (4). Drafting comments were essentially concerned with refining the provision to make it unambiguously clear that arbitration agreements could be validly concluded by means other than in the form of paper-based documents, for example, by electronic communications.

22. The Working Group noted that the notion of "record", as used in article 7, paragraph 2 of the UNCITRAL Model Law on Arbitration, was not specifically concerned with facilitating the use of electronic means of communication. The text of draft paragraph (2) had therefore been drafted on the basis of provisions of two more recent UNCITRAL texts: article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, which provides that "[a]n undertaking may be issued in any form which preserves a complete record of the text of the undertaking [...]"; and article 6(1) of the UNCITRAL Model Law on Electronic Commerce, which provides that "[w]here the

law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference".

23. The Working Group then considered at length the conceptual distinction between "record" and "data message" and the desirability of combining them in a single provision. The Working Group agreed that the notion of "record" as used in article 7, paragraph (2) of the UNCITRAL Model Law on Arbitration should be retained without being limited to "tangible" records. Some of the speakers were of the view that the term "record" alone might suffice, since it was broad enough to cover "data messages", particularly if it was linked with the definition of a form which "is otherwise accessible so as to be usable for subsequent reference". Other speakers, however, expressed the view that the term "record" might raise issues of translation in the various official languages and create difficulties in those legal systems where such notions as "record" or "business record" were not heavily relied upon in commercial law. The prevailing view was that it was important to combine the traditional notion of "record" with the more innovative notion of "data message" so as to make it clear that records other than traditional paper documents were included among the acceptable forms of recording an arbitration agreement.

24. The qualifying phrase "accessible so as to be usable for subsequent reference", was felt by some speakers to be unnecessary. The prevailing view was that it was essential in the context of paragraph (2), since it set forth the conditions whereby any message, including data messages, might meet writing requirements established by the law.

25. Having agreed to the need for making reference in paragraph (2) to both "record" and of "data messages", the Working Group proceeded to consider various drafting proposals. One proposal was that the second sentence of paragraph (2) should be redrafted along the following lines: "'writing' or 'in writing' includes any form being recorded by any means [, so as to be usable for subsequent reference]". The Working Group eventually agreed to reformulate the second sentence of paragraph (2) along the following lines: "'Writing' means any form, including without limitation a data message, that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference."

Paragraph (3)

26. The Working Group considered that a definition of "data message" was needed since that expression was used in paragraph (2) and decided to retain the provision without the square brackets.

Paragraphs (4) and (6)

27. There was general agreement that one of the main purposes of a revision of article 7 of the UNCITRAL Model Law on Arbitration should be to recognize the formal validity of arbitration agreements that came into existence in certain factual situations as to which courts or commentators had differing views on whether the form requirement set forth in the current text of article 7, paragraph (2), of the Model Law was met. Among such factual situations, the Working Group focused its attention on the following: (a) the case where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form; (b) contracts concluded by performance or by conduct (for example a sale of goods under article 18 of the United Nations Convention on Contracts for the International Sale of Goods), with reference to a standard form containing an arbitration clause, such as documents established by the Grain and Food Trade Association (GAFTA); (c) contracts concluded orally but subsequently confirmed in writing or otherwise linked to a written document containing an arbitration clause, such as the general sale or purchase conditions established unilaterally by a party and communicated to the other; and (d) purely oral contracts. As a matter of general policy, it was widely agreed that in cases (a) to (c) the

reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement. It was also agreed that a purely oral arbitration agreement should not be regarded as formally valid under the Model Law. In that context, it was observed by a number of delegations that the mere reference in an oral contract to a set of arbitration rules should not be regarded as sufficient to meet the written form requirement, since a set of procedural rules should not be regarded, in and of itself, as equivalent to a contractual document containing an arbitration clause. However, some delegations expressed the view that such a reference in an oral contract to a set of arbitration rules should be accepted as expressing sufficiently the existence and contents of the arbitration agreement, particularly when the set of rules includes a model arbitration clause.

28. Doubts were expressed as to whether draft paragraph (4) adequately expressed the above-mentioned general policy. It was pointed out that stating that "the writing requirement [...] is met if the arbitration clause [...] [is] in writing" was tautological. In addition, a concern was expressed that the reference to "the arbitration terms and conditions" was unclear and created the risk of an inconsistency between draft paragraph (4) and draft paragraph (1). As to the reference to "any arbitration rules referred to by the arbitration agreement", a further concern was that it did not take into account the need for the arbitration agreement to be sufficiently manifest to minimize the risk that a party would be drawn into arbitration against its will. Doubts were also expressed as to whether paragraph (4) could reasonably be read as consistent with the provisions of the New York Convention.

29. With a view to alleviating the above-mentioned concerns, a proposal was made that paragraph (4) should be redrafted along the following lines: "For the avoidance of doubt, the writing requirement in paragraph (2) is met if: (a) the arbitration agreement, taken per se, is made in writing; or (b) a valid contract has been concluded between the parties and such contract includes within its contents, whether directly or by reference, a clause in writing providing for arbitration". Another proposal was that paragraph (4) should be redrafted as follows: "For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause is in writing, notwithstanding that the contract has been concluded orally, by conduct or by other means not in writing".

30. However, it was generally felt that, instead of draft paragraph (4), draft paragraph (6) should be used to support the above-mentioned policy. A note of caution was struck about revising the text of draft paragraph (6), which was already contained in article 7 of the Model Law, and was generally interpreted as covering the situation where the underlying contract did not mention arbitration but incorporated by reference another document, such as a standard form, which contained an arbitration clause. It was stated that the last sentence of paragraph (2) of article 7 of the UNCITRAL Model Law on Arbitration, on which paragraph (6) was based, was generally not interpreted as interfering with the writing requirement established in respect of the arbitration agreement.

31. After discussion, the Working Group agreed that paragraph (4) should be deleted and paragraph (6) should be redrafted along the following lines: "For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a writing containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing". It was also agreed that the guide to enactment of the model legislative provision should contain detailed explanations regarding the meaning and recommended interpretation of the revised text of paragraph (6).

Paragraph (5)

32. The suggestion was made that the draft paragraph should be deleted for a number of reasons. Firstly, the reference to an "exchange of statements of claim and defence" was seen to be vague and potentially misleading since, for example, reference to the existence of an arbitration agreement was often made at an earlier stage of arbitral proceedings, such as in a notice of arbitration within the meaning of article 3 of the UNCITRAL Arbitration Rules. Secondly, the subject matter addressed in the draft paragraph was said to be already covered by articles 4 and 16(2) of the UNCITRAL Model Law on Arbitration, so that no further provision was needed. Lastly, it was suggested that the draft paragraph was excessively narrow in that it dealt only with the case where a party specifically alleged the existence of an arbitration agreement and did not cover frequent situations where the party merely stated its claim to the arbitral tribunal without an express allegation that an arbitration agreement existed.

33. In support to the deletion of the draft paragraph it was also stated that the subject matter covered therein was essentially concerned with the waiver of a party's right to object to the jurisdiction of the arbitral tribunal, rather than with the formation of the arbitration agreement itself. As such, the substance of the draft paragraph was not appropriately placed in draft article 7. In any event, if the provision was to be retained, it was suggested that it should at least be amended along the following lines: "It is deemed that the parties have concluded a valid arbitration agreement if no objection to the jurisdiction of the arbitral tribunal is raised in due time".

34. The prevailing view, however, was in favour of retaining the draft paragraph. It was said that article 4 of the UNCITRAL Model Law on Arbitration dealt with a different situation from the one contemplated in the draft paragraph, which was said to constitute a useful addition to the Model Law. Article 4 of the Model Law did not deal with the existence of the arbitration agreement, but only with the waiver of a party's right to raise objections based on alleged non-compliance with provisions of the Law from which the parties may derogate or any requirement under the arbitration agreement if that party proceeded with the arbitration without stating its objection to such non-compliance without undue delay, or, if a time-limit was provided therefore, within such period of time. Draft paragraph (5) was needed, since the narrow scope of article 4 of the Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence thereof, by virtue of the exchange of statements of claim and defense.

35. It was also pointed out that the draft paragraph had a precedent in the application of article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Washington Convention"), which, in practice, had been construed to the effect that the notice of arbitration submitted by a foreign investor to the International Centre for the Settlement of Investment Disputes under certain circumstances dispensed with the need for a special arbitration agreement.

Paragraph (7)

36. It was recalled that paragraph (7) had been placed between square brackets until further discussion had taken place as to whether the substance of the provision should be included in article 7 or in an amendment to article 35. It was also recalled that article 35(2) of the Model Law mirrored article IV of the New York Convention. Any deviation from the existing text of article 35 would therefore require additional work towards amending the New York Convention or providing means to secure a uniform yet innovative interpretation of article IV of the New York Convention.

37. The view was expressed that the issue dealt with under draft paragraph (7) would more appropriately be addressed under a revised version of both article 35 of the Model

Law and article IV of the New York Convention. It was stated that the governing principle regarding that issue was that the party seeking enforcement of an award should bear the burden of proof regarding the existence and contents of the arbitration agreement. That principle would remain unchanged even if the formal requirement regarding the submission of the arbitration agreement as a written original document was abandoned. It was thus suggested that in paragraph (2) of article 35 every reference to the arbitration agreement should be deleted. Article IV of the New York Convention should be modified accordingly.

38. Support was expressed in favour of the above-mentioned principle. In addition, it was pointed out that the suggested redraft of article 35 would present the advantage of avoiding the need for the party seeking enforcement to produce the "arbitration terms and conditions", or any other document that might encourage courts to discuss the existence of the arbitration agreement in the absence of a challenge to the tribunal's findings, which could needlessly delay enforcement.

39. However, the proposed redraft of article 35 was objected to on the grounds that amending that article could result in the need to revise article IV of the New York Convention, thereby pre-empting the result of the future discussion regarding the advisability of entering into the preparation of a protocol to the New York Convention (see below, paras. 42-50). As an alternative to the above-suggested redraft of article 35 of the Model Law, it was proposed that paragraph (7) should be deleted and a sentence should be added at the end of paragraph (6) along the following lines: "In such a case, the writing containing the arbitration clause constitutes the arbitration agreement for purposes of article 35". It was stated by its proponents that such a sentence was consistent with the New York Convention. After discussion, that proposal was adopted by the Working Group.

B. Interpretative instrument regarding Article II (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

40. It was recalled that the Working Group at its thirty-fourth session discussed a preliminary draft interpretative instrument relating to article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter, the "New York Convention") and requested the Secretariat to prepare a revised draft of the instrument, taking into account the discussion in the Working Group, for consideration at a future session (A/CN.9/487, para. 18).

41. At the current session, the Working Group proceeded with its consideration of the matter on the basis of the text of the draft declaration, as adopted by the Working Group at its thirty-fourth session (A/CN.9/487, para. 63). That text was as follows:

> "*Declaration regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*
>
> "*The United Nations Commission on international Trade Law*,
>
> "[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,
>
> "[2] *Conscious* of the fact that the Commission comprises the principal economic and legal systems of the world, and developed and developing countries,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, *inter alia*, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, *inter alia*, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...',

"[7] *Concerned about* differing interpretations of article II(2) of the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Desirous of* promoting uniform interpretation of the Convention in the light of the development of new communication technologies and of electronic commerce,

"[9] *Convinced* that uniformity in the interpretation of the term "agreement in writing" is necessary for enhancing certainty in international commercial transactions,

"[10] *Considering* that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application,

"[11] *Taking into account* subsequent international legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce,

"[12] [*Recommends*] [*Declares*] that the definition of 'agreement in writing' contained in article II(2) of the Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]".

42. In view of the progress that had been made at the current session in connection with draft new article 7 of the UNCITRAL Model Law on Arbitration, the Working Group decided that it would be useful to re-examine the various options available to deal with difficulties that had arisen in the practical application of article II(2) of the New York Convention before considering the revised draft interpretative instrument. In that respect, the views within the Working Group were divided into essentially two propositions, as summarized below.

43. Strong support was expressed to the view that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the application of article II(2) of the New York Convention and that the Working Group should focus on

the preparation of an amending protocol to the New York Convention. It was said that an interpretative instrument of the type being contemplated would have no binding legal effect in international law and was therefore unlikely to be followed by those charged with interpretation of the New York Convention. It was observed that the fact that an interpretative instrument of the type proposed would be non-binding made it questionable whether such an instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention.

44. It was further stated that the possible risk of disharmony that might result from the existence, at least for a certain period of time, of two groups of States parties to the New York Convention, namely those that adhered to the Convention in its original form only and those who, in addition, had adhered to the amending protocol, was not a convincing argument to discard the avenue of an amending protocol. In fact, it was said, disharmony already existed in the application of article II(2) of the New York Convention, and it would not be done away with by means of a non-binding interpretative instrument. An amending protocol to article II, and possibly article IV of the New York Convention, was needed if uniformity in the interpretation and application of the Convention was to be achieved.

45. Another argument in favour of an amending protocol underscored the distinction between modification of an existing text and clarification of its interpretation. It was said that it was not appropriate to use an interpretative instrument to declare that article II(2) of the Convention should be interpreted as having the meaning of article 7 of the Model Law in the wording being prepared by the Working Group. It was stated that the draft legislative provisions being considered by the Working Group differed significantly from article II(2) in that, for example, under the draft legislative provision an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II(2) of the New York Convention, as interpreted in many legal systems, it would not be so regarded. In that connection, some speakers expressed the view that reliance on the provision of article VII of the New York Convention, which allowed, in practice, for the application, in a Contracting State of the Convention, of more favourable provisions of its own laws or treaty obligations in support of an arbitration agreement or arbitral award was not an effective tool for ensuring uniformity in the respect of the application of the written-form requirement of article II(2) of the Convention.

46. The countervailing view, which also received strong support, was that formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation, because the adoption of such a protocol or amendment by a number of countries would take a significant number of years and in the interim create more uncertainty. For that reason, that approach was described by a number of delegations as essentially impractical. Given its evident success, shown by the unparalleled number of ratifications, the New York Convention could be rightly regarded as the foundation of international commercial arbitration, and that fact by itself demanded that utmost caution be used in considering any changes to its text. Caution was said to be even more important in view of the sovereign character of any diplomatic conference that might be called upon to consider any proposed amendments to the text, which would not be bound by the narrow scope of amendments currently under consideration by the Working Group. The expected positive result of enhancing certainty in the relatively narrow area of article II(2) of the New York Convention should be carefully weighed against the imponderable risk of having the entirety of the Convention re-opened for discussion

47. An additional problem impending upon the preparation of an amending protocol to the New York Convention, it was said, might be the risk of upsetting the liberal interpretation that article II(2) of the New York Convention already enjoyed in some jurisdictions. The view was expressed that starting work on a modification of the New York Convention might imply that the text could not be readily understood as allowing the interpretation that was essentially consistent with draft new article 7 of the UNCITRAL Model Law on Arbitration currently being formulated by the Working Group. A

clarification by way of an interpretative instrument, on the other hand, was said to constitute an appropriate recognition of the fact that there were differing possible interpretations of article II(2) of the New York Convention and that the Commission, which might be regarded as persuasive authority in many jurisdictions, could recommend a liberal interpretation of that text.

48. It was further pointed out that the difficulties attendant upon amendment of the New York Convention or the development of a protocol had been extensively considered at earlier sessions of the Working Group and that in view of those difficulties the Working Group had instead decided to focus on the preparation of an interpretative instrument.

49. The Working Group considered at length the various arguments that were put forward in support of both propositions. The Working Group acknowledged that it could not, at the present stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group was agreed that it would be useful to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a "friendly bridge" between the new provisions and the New York Convention, pending a final decision by the Working Group on how to best deal with the application of article II(2) of the Convention.

50. While no objections were raised to that course of action, the view was expressed that the mere fact of attempting to address the matter in a guide to enactment of the new draft article 7 of the UNCITRAL Model Law on Arbitration appeared to prejudice the consideration of a possible amending protocol to the New York Convention. Raising issues related to the New York Convention in a guide to enactment, i.e., an ancillary text of questionable legal value, appended to a new provision of the Model Law, which itself was not a mandatory instrument, was said to be a counterproductive exercise. It was stated that it would be preferable not to attempt to address in any way the issues raised by the interpretation of the writing requirements under the New York Convention. The Working Group took note of those comments.

III. Interim measures of protection

51. The Working Group continued its work on draft article 17 of the UNCITRAL Model Law on Arbitration, which contained a definition of interim measures of protection and additional provisions on *ex parte* interim measures. The text considered by the Working Group was as follows:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary [in respect of the subject-matter of the dispute].
>
> "(2) The party requesting the interim measure should furnish proof that:
>
> > "(a) there is an urgent need for the measure applied for;
> > "(b) a significant degree of harm will result if the interim measure is not ordered; and
> > "(c) there is a likelihood of the applicant for the measure succeeding on the merits of the underlying case.

"(3) The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

"(4) An interim measure or protection is any temporary measure [, whether it is established in the form of an arbitral award or in another form,] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. For the purposes of this article reference to an interim measure includes:

"*Variant 1*

"(a) a measure to maintain the status quo pending determination of the questions at issue;
"(b) a measure providing a preliminary means of securing assets out of which an award may be satisfied; or
"(c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.

"*Variant 2*

"(a) a measure to avoid or minimize prejudice, loss or damage; or
"(b) a measure to facilitate later enforcement of an award.

"(5) The arbitral tribunal may, where it is necessary to ensure that an interim measure is effective, grant a measure [for a period not exceeding [...] days] [without notice to the party against whom the measure is directed] [before the party against whom the measure is directed has had an opportunity to respond] only where:

"(a) it is necessary to ensure that the measure is effective;
"(b) the applicant for the measure provides appropriate security in connection with the measure;
"(c) the applicant for the measure can demonstrate the urgent necessity of the measure; and
"(d) [the measure would be supported by a preponderance of considerations of fairness].

"[(6) The party to whom the measure under paragraph (5) is directed shall be given notice of the measure and an opportunity to be heard at the earliest practicable time.]

"(7) A measure granted under paragraph (5) may be extended or modified after the party to whom it is directed has been given notice and an opportunity to respond.

"[(8) An interim measure of protection may be modified or terminated [on the request of a party] if the circumstances referred to in paragraph (2) have changed after the issuance of the measure.]

"[(9) The party who requested the issuance of an interim measure of protection shall, from the time of the request onwards, inform the court promptly of any substantial change of circumstances referred to in paragraph (2).]"

Paragraph (1)

52. The Working Group considered a proposal for deleting the phrase in square brackets in the draft paragraph. That phrase was said to lend itself to a restrictive interpretation, for instance, if it were understood to mean that an arbitral tribunal could only order interim measures of protection that were directly related to the assets under dispute. In response to that proposal it was said that the phrase similar to the phrase in question had been used in

article 26 of the UNCITRAL Arbitration Rules and should be kept in draft article 17 for purposes of consistency. It was pointed out that, in the context of the UNCITRAL Arbitration Rules, that phrase was meant to be liberally interpreted and, in practice, had not posed an obstacle to the exercise by arbitral tribunals of their power to order interim measures of protection that were appropriate to any given case. Therefore, it was suggested that the phrase in square brackets in paragraph (1) should be retained.

53. Nevertheless, the prevailing view in the Working Group was that the phrase in square brackets should be deleted since it might lead to an undue restriction on the power of the arbitral tribunal to issue interim measures (e.g., in that it might be considered not to cover measures for freezing of assets that were strictly speaking not the subject-matter of the dispute).

54. The Working Group, however, stressed that the streamlining of paragraph (1) should not be understood as an indication that the current wording of article 17 of the UNCITRAL Model Law on Arbitration and article 26 of the UNCITRAL Arbitration Rules excluded measures that did not relate directly to the goods in dispute.

Paragraph (2)

55. General support was expressed in favour of the structure and contents of paragraph (2). Various comments and suggestions were made for improvement of the text. With respect to the opening words of the paragraph, a question was raised as to whether the paragraph should be phrased in terms of obligations binding on the party applying for the interim measure. As a possible alternative, it was suggested that the provision should be formulated as criteria to be applied by the arbitral tribunal when making a decision upon request for an interim measure. Another suggestion was to phrase the provision in more neutral terms, for example through a statement that an interim measure may only be granted if certain conditions were met. The Working group agreed that those various alternatives might need to be reconsidered at a future session. There was general agreement that the verb "should" should be replaced by a stricter formulation, such as "shall" or "must". As to the use of the words "furnish proof", it was observed that the provision should not interfere with the various standards of proof that might be applied in different jurisdictions or within the same jurisdiction. The view was also expressed that requiring "proof" might be excessively cumbersome in the context of interim measures. With a view to avoiding a reference to "proof", the words "establish", "demonstrate" or "show" were proposed as possible alternatives to the words "furnish proof".

56. With respect to subparagraph (b), it was widely felt that the provision should be based on a "balance of convenience" under which the assessment of the degree of harm suffered by the applicant if the interim measure was not granted should be balanced against an evaluation of the harm suffered by the party opposing the measure if that measure was granted. In addition, it was felt that the quantitative approach reflected in the words "a significant degree of harm" might create uncertainties as to how a degree of harm should be considered to be sufficiently "significant" to justify certain provisional measures. It was suggested that a reference to the more qualitative notion of "irreparable harm" should be used.

57. With respect to subparagraph (c), it was suggested that the words "substantial possibility" were preferable to the word "likelihood". At the close of the discussion, a question was raised as to whether provisional measures should be available in circumstances where a contradiction would exist between the requirements of subparagraphs (a), (b), and (c). A suggestion was made that, at a future session, the Working Group might need to reopen the debate as to whether those three subparagraphs should be made cumulative or alternative requirements.

58. After discussion, the Working Group decided that the following text should be considered by the Secretariat, together with other possible alternatives, when preparing a revised version of paragraph (2) for continuation of the discussion at a future session:

"(2) *Variant A*
The party requesting the interim measure must [show] [demonstrate] [prove] [establish] that:
Variant B
The arbitral tribunal shall only issue an interim measure if it is satisfied that:
Variant C
An interim measure may only be ordered if:

"(a) *Variant X*
there is [a] [an urgent] need for the measure applied for;
Variant Y
the interim measure applied for is necessary in the particular circumstances of the case;

"(b) irreparable harm to the applicant [will] [is likely to] result if the interim measure is not ordered and that harm substantially outweighs the harm, if any, that [would] [is likely to] result to the party opposing the interim measure if the measure were ordered; [and] [or]

"(c) there is a substantial possibility that the applicant for the measure will succeed on the merits of the [dispute] [underlying case]".

Paragraph (3)

"The arbitral tribunal may require"

59. The suggestion was made that the provision of some form of security in connection with interim measures should be made mandatory so as to offer adequate protection to the party against whom such interim measures might be enforced and to reduce the risk of abuse in the use of interim measures.

60. The prevailing view within the Working Group, however, was that, while the provision of security in connection with interim measures was the norm, it should not be made mandatory. It was pointed out, in that connection, that in some legal systems the question of whether or not security needed to be provided might not be for the arbitral tribunal to decide, but rather for the authority competent for the enforcement of the interim measure. It was also stated that, in practice, there might be situations where the party requesting the interim measure might not be in a position to readily offer appropriate security, for instance, where such party had been deprived of funds by the other party. From a policy perspective, it was felt that it would be preferable to keep the matter within the discretion of the arbitral tribunal.

61. A proposal to add, for purposes of clarity, words such as "if damage is likely to be sustained by the party against whom the measure is requested" at the end of the draft paragraph did not attract sufficient support, since the Working Group felt that the purpose for which security was required was not only to provide a safeguard in the event of damage resulting from the interim measure.

"any party"

62. Questions were raised as to the exact meaning of the words "any party" in the draft paragraph. Some speakers regarded those words as being vague and suggested that they

should be replaced with a more precise formulation, such as "the applicant for the interim measure". The Working Group, however, was not in favour of replacing those words with another phrase. It was felt that the words "any party" afforded the desirable degree of flexibility to encompass, for example, the submission of alternative guarantees by the party against whom the measure was requested in order to avoid the interim measure being ordered.

63. Subject to linguistic changes to ensure consistency among the language versions, the Working Group therefore adopted the substance of the draft paragraph. It was suggested that the above discussion should be reflected in the guide to enactment of the model legislative provision.

Paragraph (4)

64. As a general comment, it was suggested that, to the extent that draft paragraph (4) defined the scope of interim measures, it should be placed immediately after draft paragraph (1). That suggestion was adopted by the Working Group.

"[, whether it is established in the form of an arbitral award or in another form,]"

65. The Working Group began its substantive discussion of the draft paragraph by considering a proposal to delete the entire phrase within square brackets in the *chapeau* of the draft paragraph. In support of that proposal it was said that the phrase in question was not needed since the possible spectrum of interim measures mentioned therein was already covered by the words "any temporary measure". The Working Group did not follow that proposal, however, since it was of the view that the phrase in question substantially added to the draft paragraph by clarifying that, depending on the circumstances and on the jurisdiction, interim measures might be issued in a variety of forms. The Working Group proceeded to consider proposed amendments to that phrase.

66. One suggestion was that the words "arbitral award" should be replaced by the words "partial or interim award". In support to that proposal it was stated that the words "arbitral award" were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words "partial award", since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measures. Doubts were expressed as to whether the words "interlocutory award" would adequately cover the various types of interim measures that might be issued in the form of an award. After discussion, the preference within the Working Group was for simply deleting the word "arbitral" without further qualifying the nature of the award.

67. Another proposal was to delete the words "or in another form" after the word " award". Such deletion was justified, it was said, in the interest of ensuring due process and the orderly conduct of the arbitral proceedings. As currently drafted, the provision contemplated the issuance of interim measures in a form other than a formal award. That situation was said to be problematic since in some legal systems only formal awards and not every procedural order or decision of an arbitral tribunal was subject to judicial review in the course of setting-aside or enforcement procedures. If the provision allowed the issuance of interim measures by means other than a formal award, the party against whom the interim measure was requested might be deprived of the rights it might otherwise have under the applicable law, for instance, to challenge the validity or enforceability of the arbitral award. That, it was said, was the reason why some of the jurisdictions that had enacted the UNCITRAL Model Law on Arbitration had expressly provided that an order of interim measures had to be issued as a formal award.

68. The prevailing view within the Working Group, however, was not in favour of deleting the words "or in another form". It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure had to take. The fact that the draft paragraph did not require the order of interim measures to be issued as a formal award, it was said, could not be regarded as diminishing any recourse or other legal means available to the party against whom such measure was ordered. It was pointed out, in that connection, that the question of whether an order of interim measures constituted an "award" for the purposes of setting-aside or enforcement rules of the forum State was not predicated upon the title or form given to the order by the arbitral tribunal. That question was settled by applicable domestic law. The draft model legislative provision, it was stated, should not interfere with any power that the competent court might have to qualify such an order as an award despite the form or title given to it by the arbitral tribunal. In that connection, it was pointed out that the question as to whether an interim measure, whether or not qualified as an "award", was subject to setting aside under article 34 of the UNCITRAL Model Law on Arbitration might need to be further considered in the context of future discussions on enforcement of interim measures.

"pending the issuance of the award"

69. In view of the fact that interim measures might be requested or issued at different stages of arbitral proceedings, it was suggested that the words "pending issuance of the award" should be replaced by words such as "at any time prior to the issuance of the award". The Working Group accepted that suggestion.

Variants 1 and 2

70. As a general comment it was said that, since the lists of measures contained in both variants could only be of an illustrative and non-exhaustive nature, it would be preferable to present them in the guide to enactment, rather than in the body of the provision. The Working Group was invited to consider, in that connection, whether variants 1 and 2 were indeed mutually exclusive or whether they could not be usefully merged into a single list.

71. The Working Group was of the view, however, that it would be useful for the draft paragraph to list, albeit in a non-exhaustive fashion, types of measures that might be ordered by an arbitral tribunal, rather than simply offering such illustration in the relevant portion of the guide to enactment. The Working group agreed that the opening words of paragraph (4) should make it abundantly clear that the list of provisional measures provided in the various subparagraphs was intended to be non-exhaustive.

72. In that connection, although support was expressed in favour of the more general formulation of Variant 2, the preference of the Working Group was generally for the more descriptive approach followed under Variant 1.

Subparagraph (a)

73. While general support was expressed for the substance of the subparagraph, it was felt that the purpose of the provisional measure might be not only to maintain but also to restore the status quo. It was agreed that subparagraph (a) should be redrafted accordingly.

Subparagraph (b)

74. It was widely agreed that subparagraph (b) should be reformulated along the following lines "a measure providing a preliminary means of securing or facilitating the enforcement of the award".

Subparagraph (c)

75. It was generally felt that the ambit of the provision should be broadened to cover also cases where the purpose of the interim measure was not to restrain but to order affirmative conduct. Along the same lines, it was felt that the scope of the provision should not cover only measures ordered against the defendant but also measures addressed to other parties. The Working Group agreed that subparagraph (c) should read along the following lines: "a measure to restrain or order conduct of any party to prevent current or imminent future harm".

Proposed new subparagraph (d)

76. With a view to facilitating the issuance of interim measures aimed at preventing destruction of evidence, it was suggested that among the illustrative list contained in paragraph (4), mention should be made of "a measure intended to provide a preliminary means of preserving evidence". That suggestion was accepted by the Working Group.

Paragraph (5)

77. Diverging views were expressed as to whether, as a matter of general policy, it would be suitable for a revision of the UNCITRAL Model Law on Arbitration to establish the possibility for interim measures to be ordered *ex parte* by an arbitral tribunal. Under one view, in line with existing arbitration laws in a number of countries, the possibility of ordering an interim measure of protection on an *ex parte* basis should be reserved only to courts of justice. It was stated that no exception should be made to the principle that each party should have equal access to the arbitral tribunal and a full opportunity of presenting its case, as expressed in article 18 of the Model Law. Recognizing the possibility that *ex parte* measures might be ordered by the arbitral tribunal was said to open an avenue for dilatory and unfair practices that should be avoided. It was also said that *ex parte* interim measures could have a damaging effect on third parties. However, the contrary view was widely expressed that the same principles that parties should be treated with equality and be given a full opportunity of presenting their case generally applied to courts of justice and in many countries were not regarded as sufficient grounds for refusing the possibility of ordering *ex parte* measures in exceptional circumstances. The prevailing view was that introducing a provision dealing with such *ex parte* interim measures into the Model Law would constitute a useful addition to the text and meet the needs of arbitration practice.

78. Various suggestions were made with a view to limiting the occurrence of possibly abusive applications for *ex parte* interim measures. One suggestion, inspired by rules applied by the International Centre for Settlement of Investment Disputes (ICSID), was that the authority of the arbitral tribunal to grant interim measures *ex parte* should be made contingent on a previous agreement being concluded to that effect by the parties. It was pointed out in response that, in the more general context of commercial arbitration, it was unrealistic to imagine that parties would agree on such a procedural rule either before of after the dispute had arisen. Another proposal was that only provisional measures intended to maintain the status quo pending determination of the question at issue could be ordered *ex parte* by the arbitral tribunal. That proposal was objected to on the grounds that it would not cover the situation where the interim measure was aimed at restoring a situation altered by the aggressive action of a party. Yet another proposal was that *ex parte* interim measures should only be regarded as acceptable where circumstances made it impossible to notify the other party. A further proposal, which attracted support from a number of delegations, was that the revised text of article 17 of the Model Law should establish an obligation for any party who sought an *ex parte* interim measure to inform the arbitral tribunal of all circumstances, including circumstances adverse to its position, that the arbitral tribunal was likely to find relevant and material to its determination whether the requirements of paragraph (5) had been met. Such an obligation was referred to as "full and frank disclosure", and described as already known to certain legal systems. Doubts

were expressed, however, by delegations familiar with other legal systems as to whether the proposed obligation would be entirely covered by the more widely known concept of "good faith". Concerns were raised regarding the acceptability of such an obligation if it resulted in requiring a party to act positively against its own interests. Questions were also raised regarding the exact contents of the obligation and regarding the consequences that might flow from failure by the applicant to comply. It was suggested that further research might be needed as to such consequences, which might include revocation of the interim measure or damages if the interim measure had been improperly procured.

79. Also with a view to limiting the possibly negative impact of ex parte interim measures, another suggested approach was to limit or exclude the possibility of court enforcement of *ex parte* interim measures. Support was expressed in favour of exploring the ways in which the court enforcement of an interim measure initially ordered *ex parte* could be made subordinate to its later confirmation *inter partes* by the arbitral tribunal. Support was also expressed in favour of establishing the *ex parte* nature of a provisional measure as a possible ground for refusing enforcement. Doubts were expressed, however, as to whether interim measures ordered *ex parte* by an arbitral tribunal would still present any attractiveness to practitioners if the revised text of the Model Law made them unenforceable. In that connection, it was pointed out that in certain countries where the court system would experience difficulties in reacting expeditiously to a request for an *ex parte* interim measure, it would be essential to establish the enforceable character of such an interim measure when ordered by an arbitral tribunal. The Working Group did not come to a conclusion regarding the enforcement of *ex parte* interim measures. It was agreed that the issue would need to be considered further in the context of the general discussion regarding enforcement of interim measures.

Chapeau of draft paragraph (5)

80. Turning its attention to the specific formulation of paragraph (5), the Working Group, discussed the definition of *ex parte* interim measures in the *chapeau* of draft paragraph (5). A suggestion was made that the *chapeau* of draft paragraph (5) should be prefaced with the words "In exceptional circumstances". While the view was generally shared that *ex parte* interim measures should only be considered in exceptionally urgent circumstances, doubts were expressed as to whether the inclusion of the suggested words in the draft provision would be sufficiently clear to provide an objective criterion. As a matter of drafting, it was pointed out that the words "where it is necessary to ensure that an interim measure is effective" were redundant with subparagraph (a) and should be deleted.

81. With respect to the words "[for a period not exceeding [...] days]", the view was expressed that the matter of time-limitation of the measure should be left to the discretion of the arbitral tribunal. Another view was that the issue of time limitation would be more appropriately dealt with in the context of a limitation of the time set forth to notify the defendant of the interim measure under draft paragraph (6). The prevailing view was that the duration of any *ex parte* interim measure should be limited and that the words should be retained. It was suggested that the limitation on the duration of an interim measure of protection granted under paragraph (5) should not affect the authority under paragraph (2) of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection after the party against whom the measure was directed had been given notice and an opportunity to respond.

82. With respect to the alternative wordings between square brackets ([without notice to the party against whom the measure is directed] [before the party against whom the measure is directed has had an opportunity to respond]), some preference was expressed for the more descriptive wording along lines of: "before the party against whom the measure is directed has had an opportunity to respond". The view was expressed that the two wordings might be combined to reflect the situation where the applicant was unable to give notice to the respondent, for example where the respondent could not be located on time, as

distinct from the situation where the applicant chose not to give notice to the respondent so as not to undermine the effectiveness of the interim measure, for example where the respondent could be expected to transfer assets out of the jurisdiction.

83. As to the requirements that should be met for an interim measure to be granted *ex parte*, it was generally agreed that interim measures considered under draft paragraph (5) should at least meet all the prerequisites for the issuance of an interim measure set forth under draft paragraph (2).

Subparagraph (a)

84. The substance of subparagraph (a) was found generally acceptable. The view was expressed, however, that the notion that the measure should be "effective" was insufficiently precise. It was suggested to use the words "in order to ensure that the execution of the order is not frustrated".

Subparagraph (b)

85. The production by the applicant of appropriate security in connection with the interim measure was regarded by a number of delegations as essential to avoid abusive applications for *ex parte* interim measures. Doubts were expressed, however, as to whether the existence of such security should be made a mandatory pre-requisite for the issuance of an *ex parte* interim measure or whether the issue should be left to the discretion of the arbitral tribunal.

Subparagraph (c)

86. While the view was expressed that the reference to the urgent necessity of the measure should be the determining factor for envisaging the issuance of an *ex parte* interim measure, concern was expressed regarding the possible redundancy of subparagraph (c) of draft paragraph (5) with subparagraph (a) of draft paragraph (2). To the extent that urgency would be retained as a general criterion under draft paragraph (2), it should be deleted from draft paragraph (5), unless it could be qualified so as to provide a distinct criterion in the context of *ex parte* interim measures.

Subparagraph (d)

87. In view of its earlier deliberations regarding draft paragraph (2), the Working Group agreed that subparagraph (d) was not needed and should be deleted.

88. With a view to reflecting some of the above-mentioned views and concerns, various suggestions were made for simplifying the text of draft paragraph (5). One suggestion read as follows: "Upon receipt of a request to issue an interim measure, the arbitral tribunal shall have the power to take any measure as it deems necessary in order to assure the effectiveness of the interim measure in case it is granted". Another proposal read as follows: "The arbitral tribunal may, where the requirements of paragraph (2) are met and where it is necessary to ensure that an interim measure is effective, grant a measure before the party against whom the measure is directed has had an opportunity to respond". Yet another proposal was made for a redraft of paragraph (5) and the remainder of draft article 17 as follows:

> "Para (5)
>
> "[In exceptional circumstances,] the arbitral tribunal may grant an interim measure of protection for a period not exceeding [... days], without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond, where:

"(a) the requirements of paragraph (2) are met; and
"(b) the arbitral tribunal determines [, and so states in a written finding,] that it is necessary to proceed in such manner in order to ensure that the measure is effective.

"New Para (6)

"A party who seeks an interim measure of protection under paragraph (5) shall have an obligation to inform the arbitral tribunal of all circumstances, including circumstances adverse to its position, that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of that paragraph have been met.

"At the beginning of present paragraph (6), to be renumbered, add the following text

"Unless the arbitral tribunal makes a determination under paragraph (5)(b) that it is necessary to proceed without notice to the party against whom the measure is directed in order to ensure that the measure is effective, that party shall.

"Reformulation of present paragraph (7), to be renumbered --

"The limitation on the duration of an interim measure of protection granted under paragraph (5) shall not affect the authority under paragraph (2) of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection after the party against whom the measure is directed has been given notice and an opportunity to respond.

"Present paragraph (3) should be placed here if the consensus is to make the order of security discretionary in all cases, whether ex parte or not.

"Reformulation of present paragraph (8), to be renumbered

"The arbitral tribunal may modify or terminate an interim measure of protection at any time in light of additional information or a change of circumstances.

"Reformulation of present paragraph (9), to be renumbered

"Delete "court" *and substitute* "arbitral tribunal"
"Add "in these circumstances" *after* "substantial change"
"Delete "referred to in paragraph (2) *and substitute* "on the basis on which the application sought or the arbitral tribunal granted the interim measure of protection.

"Proposal on Enforcement

"A court before which recognition or enforcement of an award or order of an interim measure of protection issued under article 17(5) is sought [shall not] [need not] refuse recognition or enforcement on the grounds set forth in article 36(1)(a)(ii) if the court determines that it is necessary to proceed without notice to the party against whom the measure is directed in order to ensure that the measure is effective".

89. Some support was expressed in favour of the three proposals. The discussion focused on the suggested revision of paragraph (5) and the suggested wording for a new

paragraph (6) in the latter proposal. For lack of sufficient time, the Working Group did not consider the remainder of that proposal.

90. With respect to the words: [, and so states in a written finding], doubts were expressed as to whether the proposed text was intended simply to refer to the fact that the decision of the arbitral tribunal should be reasoned (in which case the additional wording was probably superfluous), or whether it would result in the obligation for the arbitral tribunal to express in an additional writing the reasons for which it found it necessary to proceed *ex parte* (in which case the obligation could be regarded as excessively burdensome). It was stated in response that it was essential to ensure that explanations in writing would be produced by the arbitral tribunal and specifically address the reasons for which it considered it necessary to proceed *ex parte*.

91. The view was expressed that a limit should be stated regarding the duration of a provisional measure ordered *ex parte*. While it was widely realized that it might be difficult to achieve consensus as to a precise duration, it was suggested that including words along the lines of "for a limited period of time" to be determined by the arbitral tribunal might sufficiently cover the point. Another view that attracted support was that in the case of *ex parte* interim measures, the provision of appropriate security by the applicant should be mandatory, particularly since a question might arise as to whether any claim for damages that could result from harm caused to the respondent as a result of the *ex parte* interim measure would constitute a new claim or fall within the scope of the arbitration. It was suggested that that question would need to be answered in the context of the revision of the Model Law.

92. A suggestion was made to reverse the order of new subparagraphs (a) and (b).

93. With respect to suggested new paragraph (6), a suggestion was made that the words "including circumstances adverse to its position" should be deleted. Another suggestion was that wording along the lines of "all circumstances of which the party who seeks the interim measure was or should have been aware" should be used. It was pointed out that such wording might avoid the ambiguities and uncertainties that might be associated with the words, "circumstances [...] that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of that paragraph have been met".

94. The Working Group did not come to a conclusion on the issue of paragraph (5). The Secretariat was requested to prepare a revised draft, with possible variants, to reflect the various views, concerns and proposals expressed at the current session.

Notes

1. *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

2. Ibid., paras. 340-343.

3. Ibid., paras. 344-350.

4. Ibid., paras. 371-373.

5. Ibid., paras. 374 and 375.

6. Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

7. Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.

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Report of the Working Group on Electronic Commerce on its thirty-ninth session

(New York, 11-15 March 2002)

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I. Introduction

1. At its thirty-third session, in 2000, the United Nations Commission on International Trade Law held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");[1] the second was online dispute settlement; and the third topic was dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work on those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group on Electronic Commerce would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001). It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[2] The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (see A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics consi
Working Group, namely: (a) a compre
of possible legal barriers to the d
electronic commerce in international ins
further study of the issues related to tra
in particular rights in tangible goods,
means and mechanisms for publicizing
record of acts of transfer or the creat
interests in such goods; and (c) a study
UNCITRAL Model Law on Internation
Arbitration, as well as the UNCITRA
Rules, to assess their appropriateness f
specific needs of online arbitration (se
para. 134).

4. At the thirty-fourth session of the C
2001, there was wide support for the rec
made by the Working Group, which
constitute a sound basis for future
Commission. The views varied, howev
the relative priority to be assigned to t
line of thought was that a project aimi
obstacles to electronic commerce
instruments should have priority over th
in particular over the preparation of a ne
instrument dealing with electronic cont
said that references to "writing",
"document" and other similar provisio
uniform law conventions and trade agree
created legal obstacles and generated
international transactions conducted
means. Efforts to remove those obstacle
delayed or neglected by attaching hig
issues of electronic contracting.

5. The prevailing view, however, wa
the order of priority that had been recom
Working Group. It was pointed out, in t
that the preparation of an internatio
dealing with issues of electronic contr
consideration of appropriate ways to re
to electronic commerce in existing
conventions and trade agreements wer
exclusive. The Commission was rei
common understanding reached at
session that work to be carried out b
Group could involve consideration of s
parallel as well as preliminary dis
contents of possible uniform rules on c
the above-mentioned topics.[3]

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission's deliberations, was that the Working Group should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (see A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (see A/CN.9/484, para. 95) and without unduly interfering with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (see A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[4]

8. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its thirty-ninth session in New York, from 11 to 15 March 2002. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sweden, Thailand, Uganda, United States of America and Uruguay.

9. The session was attended by observers from the following States: Argentina, Australia, Bangladesh, Belgium, Cyprus, Czech Republic, Denmark, Dominican Republic, Finland, Indonesia, Iraq, Ireland, Israel, Malta, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, Switzerland, Tunisia and Turkey.

10. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: United Nations Conference on Trade and Development, World Bank, World Intellectual Property Organization and United Nations Industrial Development Organization; (b) intergovernmental organizations: European Space Agency, Hague Conference on Private International Law, Inter-American Development Bank and Organisation for Economic Cooperation and Development; and (c) non-governmental organizations invited by the Commission: Association of the Bar of the City of New York, International Association of Ports and Harbors, International Chamber of Commerce, International Law Institute, International Union of Marine Insurance, Internet Law and Policy Forum and Union internationale du Notariat.

11. The Working Group elected the following officers:

Chairman: Jeffrey Chan Wah Teck (Singapore)

Rapporteur: André Akam Akam (Cameroon)

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.IV/WP.92); (b) note by the Secretariat discussing selected issues on electronic contracting, containing, as its annex I, an initial draft tentatively entitled "Preliminary Draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95); (c) note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96); (d) note by the Secretariat containing information on the progress made thus far by the Secretariat in connection with the Working Group's

consideration of ways to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.94).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Electronic contracting: provisions for a draft convention.
4. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
5. Other business.
6. Adoption of the report.

II. Deliberations and decisions

14. The Working Group reviewed the preliminary draft convention contained in annex I of the note by the Secretariat (A/CN.9/WG.IV/WP.95). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section III below. The Secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its fortieth session, tentatively scheduled to take place in Vienna from 14 to 18 October 2002.

15. The Working Group began its deliberation by considering the form and scope of the preliminary draft convention (see paras. 18-40). The Working Group agreed to postpone a discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by firstly taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (see paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (see paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion on draft article 15 (see paras. 122-125). The Working Group agreed that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) at its fortieth session.

16. The Working Group took note of the progress made thus far by the Secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international instruments on the basis of a note by the Secretariat containing information on that survey (A/CN.9/WG.IV/WP.94). The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the Secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat.

17. The Working Group considered oral reports by the Secretariat on developments concerning online arbitration and on the status of consideration by the Secretariat of issues related to transfer of rights by electronic means, in particular, transfer of rights in tangible goods. The Working Group agreed on the importance of both topics, which should be kept under review by the Secretariat for consideration by the Working Group at an appropriate stage.

III. Electronic contracting: provisions for a draft convention

General comments

18. Before considering the individual provisions for a draft convention on electronic contracting, the Working Group engaged in a general exchange of views

concerning the form and scope of the instrument, its underlying principles and some of its main features.

1. Form of the instrument

19. The Working Group took note of the fact that the form of a preliminary draft of an international convention dealing with issues of electronic contracting had been chosen so as to reflect a preliminary working assumption made by the Working Group, of which the Commission had taken note at its thirty-fourth session, in 2001, namely, that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with issues of contract formation in electronic commerce (see A/CN.9/484, para. 124).

20. The Working Group heard various statements in support of preparing an international convention dealing with issues of electronic contracting, which was said to be best suited to ensure the degree of uniformity and legal certainty required by international trade transactions. While the view was also expressed that it would instead be preferable to prepare a non-binding instrument, such as recommendations on guidelines on electronic contracting, the Working Group maintained its preliminary working assumption that it should focus on the preparation of a stand-alone convention. The Working Group was agreed that its working assumption would be without prejudice to a final decision, at an appropriate stage, concerning the form of the instrument under consideration. A widely shared view, in that connection, was that the Working Group should keep a flexible approach to the question of the form of the instrument until it had considered in more detail the scope of the instrument and its substantive provisions.

2. Scope of the instrument

21. The Working Group heard expressions of support for a proposal that its work should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. It was suggested that the main objective of the Commission's work should be to eliminate legal barriers to international transactions that generally resulted from international disharmony of contract law. Disharmony in the area of contract formation, however, was not specific to electronic contracts. With a few exceptions (such as contracts for the sale of goods, which benefited from the harmonized regime established by the United Nations Sales Convention), the formation of most international commercial contracts was not subject to widely accepted uniform legislative regimes.

22. The Working Group heard various arguments for not regulating electronic contracts separately from commercial contracts in general. It was said that the preparation of an instrument dealing specifically with issues related to electronic contracting carried with it the risk of establishing a duality of regimes depending on the means used for contract formation. The result might be that a contract other than, for example, a sales contract governed by the United Nations Sales Convention would benefit from an internationally harmonized regime when it was concluded by electronic means but not if it was concluded by other means, such as by paper-based communications.

23. The Working Group was sympathetic to the arguments put forward in favour of broadening the scope of the draft convention so as to deal generally with issues of contract formation irrespective of the means used by the parties for negotiating their contracts. The prevailing view within the Working Group, however, was that it might be overly ambitious, at the current stage, to engage in harmonizing contract law in general. It was pointed out that the mandate of the Working Group was limited to issues of electronic contracting and that expanding the scope of the work would require further consideration by the Commission of the feasibility of achieving international consensus on broad issues of contract formation (for further discussion on this matter, see paras. 68-70). The practical importance of working on electronic contracting was also emphasized. If contracts concluded by electronic means were not fundamentally different from contracts concluded by other means, they posed a number of practical questions that required specific attention.

24. Having agreed that its work should focus on issues related to electronic contracting, the Working Group proceeded to consider other general comments relating to the scope of the draft convention. Those general comments were essentially concerned with the following issues: the notion of "electronic contracting"; whether the draft convention should be limited to issues of contract formation or whether it could deal with certain issues of contract performance;

whether the draft convention should deal only with commercial contracts or whether it should also cover transactions involving consumers; whether the draft convention should deal only with international contracts or whether it should apply without distinction to both domestic and international transactions.

25. The Working Group took note of the general comments made on those issues and decided to revert to them when considering the provisions dealing with the sphere of application of the draft convention at its fortieth session.

3. Underlying principles

26. It was widely agreed that the draft convention should give full recognition to the principles of freedom of contract and party autonomy, which were recognized in various texts that had been prepared by the Commission, such as the United Nations Sales Convention.

27. The Working Group noted that its work on electronic contracting was evolving against the background of earlier instruments that had been prepared by the Commission, in particular the United Nations Sales Convention and the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures. While every effort should be made to avoid interfering unduly with the legal regime established by those instruments, in particular the United Nations Sales Convention, the Working Group took note of the suggestion that its work on electronic contracting might require formulating specific solutions for issues not dealt with in those earlier instruments or adapting some of the provisions of those instruments, in particular the model laws, to the current context.

Article 1. Scope of application

28. The text of the draft article read as follows:

Variant A

"1. This Convention applies to contracts concluded or evidenced by means of data messages.

"2. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

"[3. A State may declare that it will apply this Convention only to contracts concluded between parties having their places of business in different States or [when the rules of private international law lead to the application of the law of a Contracting State or] when the parties have agreed that it applies.]

"[4. Where a State makes a declaration pursuant to paragraph 3, the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]"

Variant B

"1. This Convention applies to international contracts concluded or evidenced by means of data messages.

"2. For the purposes of this Convention a contract is considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States.

"3. This Convention also applies [when the rules of private international law lead to the application of the law of a Contracting State or] when the parties have agreed that it applies.

"[4. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]

"5. [Neither] The nationality of the parties [nor the civil or commercial character of the parties or of the contract] is [not] to be taken into consideration in determining the application of this Convention."

Choice between variants A and B

29. The Working Group noted that the fundamental difference between variants A and B was that variant A made the draft convention applicable, in principle, to any contract "concluded or evidenced by means of data messages", without distinction between domestic and

international contracts, whereas variant B made the draft convention applicable only to "international" contracts. The Working Group thus proceeded to consider which of the two approaches should be used to define the geographical sphere of application of the draft convention.

30. In favour of the approach embodied in variant A, it was said that parties communicating through electronic means might not always know in advance the location of their counterparts' places of business. Thus, making the application of the draft convention dependent upon whether the parties were located in different States might reduce the benefit of legal certainty and predictability that the draft convention sought to provide. It was also suggested that the provisions of the draft convention might also be relevant to purely domestic transactions, since they dealt with issues that arose in connection with most distance contracts and not exclusively in connection with international contracts.

31. The prevailing view within the Working Group, however, was that the draft convention should be limited to international contracts so as not to interfere with domestic law. Such a limitation was desirable in order to ensure consistency with the approach taken in most of the instruments that had been prepared thus far by the Commission.

32. Having agreed on retaining variant B as its working assumption, the Working Group proceeded to consider its individual provisions.

Paragraph 1

33. Several questions were raised concerning the meaning of the phrase "contracts concluded or evidenced by means of data messages" and its appropriateness to describe the substantive field of application of the draft convention.

34. It was pointed out that it was potentially misleading to state that the draft convention "applied to contracts" since its provisions only dealt with certain issues related to the use of data messages, in particular in the context of contract formation. The formulation of paragraph 1 was also criticized as being too restrictive and not in accordance with the principle of media neutrality, since, in practice, many contracts were concluded by a mixture of oral conversations, telefaxes, paper contracts, electronic mail (e-mail) and web communication. If the provision was read as applying only to contracts concluded exclusively by means of data messages, it might cause an undesirable limitation in the field of application of the draft convention. In turn, if paragraph 1 was also intended to cover contracts formed by a combination of means, including data messages, it should be reformulated so as to avoid questions as to the extent to which data messages needed to be used in order to trigger the application of the draft convention.

35. Furthermore, it was pointed out that practical use of data messages was not confined to the context of contract formation, as data messages were used for the exercise of a variety of rights arising out of the contract (such as notices of receipt of goods, notices of claims for failure to perform or notices of termination) or even for performance, as in the case of electronic fund transfers. As currently drafted, paragraph 1 was felt to be too narrow, thus depriving all electronic communications used in commercial transactions other than for purposes of contract formation of the benefits of legal certainty that the draft convention was intended to achieve.

36. Having considered the various comments that had been made, the Working Group agreed that the definition of the substantive field of application should be revised by focusing on the use of data messages in the context of commercial transactions, as was the case of article 1 of the UNCITRAL Model Law on Electronic Commerce, rather than on "contracts concluded by data messages".

Paragraph 2

37. It was noted that the United Nations Sales Convention only applied to international contracts if both parties were located in contracting States of the Convention. In order to ensure consistency between the two texts, it was suggested that similar wording should be used in the draft paragraph. It was agreed that a future version of the draft paragraph would offer an additional phrase reflecting that suggestion, for future consideration by the Working Group.

Paragraph 3

38. It was suggested that the words "when the rules of private international law lead to the application of the law of a Contracting State", which appeared in square brackets, should be deleted since they might

cause an expansion of the scope of application of the draft convention beyond what was initially contemplated by the Working Group. It was suggested that such expansion, owing to its inherent ex post facto nature, would significantly reduce certainty at the time of contracting. The initial reaction of the Working Group was that the proposal needed to be considered further, since the phrase in question also appeared in article 1, subparagraph (b), of the United Nations Sales Convention, and the majority of States that had adhered to the Convention had not excluded the application of that provision, as authorized by article 95 of the Convention.

39. The Working Group took note of the views that had been expressed. It was agreed that the matter might require further consideration by the Working Group when considering a revised version of the draft convention.

Paragraphs 4 and 5

40. In order to ensure consistency between the two texts, it was agreed that the language in paragraphs 4 and 5 of the draft convention should be aligned with the corresponding language in article 1, paragraphs 2 and 3, of the United Nations Sales Convention and that the square brackets around paragraph 4 and within paragraph 5, where appropriate for that purpose, should be removed.

Article 7. Location of the parties

41. The draft article, as considered by the Working Group, read as follows:

"1. For the purposes of this Convention, a party is presumed to have its place of business at the geographic location indicated by it in accordance with article 14 [, unless it is manifest and clear that the party does not have a place of business at such location and that such indication is made solely to trigger or avoid the application of this Convention].

"2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

"3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

"4. The location of the equipment and technology supporting an information system used by a legal entity for the conclusion of a contract, or the place from which such information system may be accessed by other persons, in and of themselves, do not constitute a place of business [, unless such legal entity does not have a place of business].

"5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country."

42. As a general comment, it was noted that the purpose of the draft article was to offer elements that allowed the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. As such, the draft article was one of the central provisions in the preliminary draft convention and one that might be essential, if the sphere of application of the preliminary draft convention was defined along the lines of variant B of draft article 1.

Paragraph 1

43. It was pointed out that draft paragraph 1 built upon a proposal that had been made at the thirty-eighth session of the Working Group, to the effect that the parties in electronic transactions should have the duty to disclose their places of business (see A/CN.9/484, para. 103). That duty was reflected in draft article 14, paragraph 1 (b). It was also pointed out that, in line with the spirit of the Working Group's consideration of this matter at its thirty-eighth session (see A/CN.9/484, paras. 96-104), draft paragraph 1 was not intended to create a new concept of "place of business".

44. The Working Group noted that considerable legal uncertainty was caused at present by the difficulty of determining where a party to an online transaction was located. While that danger had always existed, the global reach of electronic commerce had made it more difficult than ever to determine location. That

uncertainty, it was also noted, could have significant legal consequences, since the location of the parties was important for issues such as jurisdiction, applicable law and enforcement. Accordingly, there was wide agreement within the Working Group as to the need for provisions that facilitated a determination by the parties of the places of business of the persons or entities they had commercial dealings with. The views differed, however, as to whether a provision along the lines of the draft paragraph offered an adequate solution to meet that need.

45. Pursuant to one view, the draft paragraph was not needed since the definition of "place of business" in draft article 5 already provided the elements that allowed the parties to ascertain each other's places of business. The prevailing view, however, was that the elements used in the definition of "place of business" might not be apparent to the parties solely on the basis of their communications and that further elements should be offered, in particular a provision that enabled the parties to rely on representations made to them in the course of their dealings and attached certain legal consequences to those representations.

46. It was noted that, for that purpose, the draft paragraph created a presumption that a party was located at the place stated by it to be its place of business pursuant to article 14. That formulation was criticized, however, as being excessively narrow, since the latter provision only required parties offering goods or services through an information system that was generally accessible to the public to make available certain information, including an indication of its place of business, to parties accessing such information system. It was suggested that the draft paragraph should be broadened so as to cover all parties to transactions falling under the convention and not only those which offered services through open systems such as the Internet. A widely shared view in that connection was that an indication of the place of business for the purposes of draft article 7 should also be contemplated for parties offering goods or services through systems other than generally accessible communications systems, as well as for parties ordering goods or services through both types of system.

47. Pursuant to another view, the essential difficulty raised by the draft paragraph was that, by establishing a rebuttable presumption concerning a party's location, the draft provision exacerbated, rather than reduced, legal uncertainty in electronic transactions. It was said that the possibility of adducing evidence that a party was located at a place other than the place of business it had indicated might give opportunity for protracted litigation concerning the applicability of the draft convention. In order to overcome those difficulties, it was suggested that the draft paragraph should facilitate a positive determination of the parties' places of business by providing that they should be deemed to be located at the places indicated by them as their places of business. The Working Group took note of that suggestion and expressed its sympathy for the concerns it intended to address. The prevailing view, however, was that it was preferable to retain the formulation of the draft paragraph as a rebuttable presumption. It was felt that it would be undesirable to create the impression that the draft convention upheld an indication of a place of business by a party even where such an indication was inaccurate or intentionally false.

48. The Working Group proceeded to consider the conditions under which the presumption established by the draft paragraph might be rebutted. Pursuant to one view, which received expressions of strong support, the clause within square brackets in the draft paragraph was not needed and should be deleted with a view to enhancing legal certainty in the interpretation of the draft paragraph. In particular the last phrase within square brackets ("and such indication is made solely to trigger or avoid the application of this Convention") was said to be of questionable usefulness, as the parties were in any event free, under draft article 1, paragraph 3, to agree to the application of the draft convention, or to exclude its application, under draft article 4. Moreover, it was suggested that trading partners acting in good faith would normally be expected to provide accurate and truthful information concerning the location of their places of business. The legal consequences of false or inaccurate representations made by them were not primarily a matter of contract formation, but rather a matter of criminal or tort law. To the extent that those questions were dealt with in most legal systems, they would be governed by the applicable law outside the draft convention.

49. The countervailing view, which was also widely shared, was that it was important to include in the draft paragraph a provision allowing the parties or the court to disregard a representation made by one party when

such representation was manifestly inaccurate or untruthful. It was said that such a provision was not intended to establish any form of criminal liability or liability in tort but merely to prevent situations where a party might benefit from making recklessly inaccurate or untruthful representations. The provision, it was further said, could not be regarded as giving rise to legal uncertainty, in view of the high standard required to rebut the presumption of paragraph 1. The views varied, however, as to whether the clause within square brackets should be entirely retained, as suggested by some, or limited only to the first phrase ("unless it is manifest and clear that the party does not have a place of business at such location"), as proposed by others. A third suggestion was that the two phrases should not be kept as cumulative conditions, in view of the great difficulty of demonstrating that it was both "manifest and clear" that a party did not have its place of business at a certain location and that its indication of a place of business had been made solely for the purposes of triggering or avoiding the application of the convention.

50. Having considered the various comments that had been made, the Working Group generally felt that it should consider further the provisions dealing with the location of the parties and that, for that purpose, the various elements currently contained in the draft paragraph could be tentatively retained. The Secretariat was requested to prepare a revised version that took into account the various views that had been expressed, including the deliberations of the Working Group on the remainder of the draft article (see paras. 51-59), as well as on article 14 (see paras. 60-65). In preparing such a revised version, the Secretariat should attempt to reformulate the draft paragraph as a general provision that offered an initial presumption of the parties' location, based on their indication of their places of business, which should be followed by appropriate fall-back provisions in the absence of such an indication or in the event that the presumption could not be relied upon.

Paragraph 2

51. The view was expressed that the draft paragraph, which was based upon article 10, subparagraph (a), of the United Nations Sales Convention, might not be appropriate in an instrument that was not restricted to sales contracts. It was pointed out, in that connection, that the cumulative reference to a place of business that had "the closest relationship to the contract and its performance" had given rise to uncertainty, since there might be situations where a given place of business of one of the parties was more closely connected to the contract, but another of that party's places of business was more closely connected to the performance of the contract. Those situations were not rare in connection with contracts entered into by large multinational companies and might become even more frequent as a result of the current trend towards increased decentralization of business activities. It was therefore suggested that the draft paragraph might need to be reformulated.

52. That suggestion was objected to on the grounds that its adoption might lead to a departure from the text of the United Nations Sales Convention, as a result that should be generally avoided by the Working Group. Inconsistencies between the two instruments were said to be particularly undesirable in view of the risk of introducing a duality of regimes for sales transactions depending on the means used for their negotiation.

53. In response to those objections it was said that the Working Group should not generally exclude the possibility of using new criteria for determining a party's place of business or for improving upon the criteria that had been used in the United Nations Sales Convention. It was suggested that other criteria, potentially more suited to the needs of electronic commerce, had been developed since the adoption of the United Nations Sales Convention. Those additional criteria might include elements such as the place of an entity's organization or its place of incorporation.

54. The Working Group considered at length the different views that had been expressed and agreed that the matter required further study. It was also agreed that, while retaining the draft paragraph, the Working Group could explore using supplementary elements to the criteria used in the draft paragraph, possibly by expanding the definitions of "place of business" contained in draft article 5. It was noted that such an approach would not be inconsistent with the United Nations Sales Convention since the latter did not provide a definition of the expression "place of business".

Paragraph 3

55. Apart from drafting comments and subject to the Working Group's tentative conclusions with regard to

the structure of the entire draft article 7, the draft paragraph was generally felt to be acceptable.

Paragraphs 4 and 5

56. The Working Group noted that, unlike the previous draft paragraphs, which offered positive indications of matters to be taken into account when determining a party's place of business, the two draft paragraphs mentioned elements what would not, in and of themselves, provide a firm indication of a party's place of business.

57. The Working Group considered a number of questions that were raised concerning the meaning of, and need for, the two draft paragraphs. In connection with paragraph 5, the view was expressed that the phrase within square brackets was not needed and should be deleted since most business entities could normally be expected to possess one or more of the elements of the sequence of fall-back solutions that a revised version of draft article 7 should offer to ascertain the location of a party's "place of business". The countervailing view was that it might be useful for the Working Group to study further the issues raised by the draft paragraph in the light of practical developments concerning the manner in which entities offering goods or services online organized their business. One situation that might need to be addressed in draft paragraph 4, possibly by combining it with paragraph 5, it was said, related to offers of goods or services by direct electronic mailing to a target audience through a web portal made available by a third party, such as a web host.

58. The view was expressed that draft paragraph 5 was not needed and should be deleted. In some countries, it was said, the assignment of domain names was only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what was suggested in the draft paragraph. For countries where such verification was not made, the rule might be seen as superfluous and might therefore be deleted. In practice, it was further said, there might be only few, if any, entities whose places of business would need to be arrived at on the basis of domain names alone.

59. Having considered the various views that had been expressed, the Working Group decided to retain, for further consideration, the elements mentioned in draft paragraphs 4 and 5, including the language in square brackets in draft paragraph 4. The Working Group agreed to consider, at a later stage, whether the two provisions might be usefully combined into one single paragraph.

Article 14. General information to be provided by the parties

60. The text of the draft article, as considered by the Working Group, read as follows:

"1. A party offering goods or services through an information system that is generally accessible to the public shall render the following information available to parties accessing such information system:

"(a) Its name and, where the party is registered in a trade or similar public register, the trade register in which the party is entered and its registration number, or equivalent means of identification in that register;

"(b) The geographic location and address at which the party has its place of business;

"(c) Details, including its electronic mail address, which allow the party to be contacted rapidly and communicated with in a direct and effective manner.

"2. A party offering goods or services through an information system that is generally accessible to the public shall ensure that the information required to be provided under paragraph 1 is easily, directly and permanently accessible to parties accessing the information system."

61. The Working Group noted that the draft article was intended to enhance certainty and clarity in international transactions by ensuring that a party offering goods or services through open networks, such as the Internet, should offer at least information on its identity, legal status, location and address. It was pointed out that the draft article reflected the proposal, which had been positively received at the Working Group's thirty-eighth session, that persons and companies making use of such open networks should at least disclose their places of business (see A/CN.9/484, para. 103).

62. There was general agreement within the Working Group that certainty in international transactions conducted by electronic means might benefit from international rules and standards that encouraged parties to disclose their location, among other elements. Views differed, however, as to whether the draft convention was the appropriate instrument for providing such a rule, as well as on the appropriateness of the draft article for that purpose.

63. Pursuant to one view, which was widely shared, obligations to disclose certain information would be more appropriately placed in international industry standards or guidelines, rather than in an international convention dealing with electronic contracting. Another possible source of rules of that nature might be domestic regulatory regimes governing the provision of online services, especially under consumer protection regulations. The inclusion of rules along the lines of the draft article was regarded as particularly problematic in the draft convention since the text did not provide for the consequences that might flow from failure by a party to comply with the disclosure requirements contemplated in the draft article. On the one hand, rendering commercial contracts invalid or unenforceable for failure to comply with the draft article was said to be an undesirable and unreasonably intrusive solution. On the other hand, providing for other types of sanctions, such as tort liability or administrative sanctions, was said to be clearly outside the scope of the draft convention.

64. The countervailing view, which also received strong support, was that the draft article was useful to help the parties determine whether a particular transaction would be regarded as domestic or international and to take measures necessary to protect their rights, in particular in the event of disputes or litigation. The draft article, it was said, could not be seen as excessively intrusive and did not impose an unreasonable burden on business entities, since the information contemplated therein was of a general nature and not concerned with a company's internal affairs.

65. Having considered the various views that had been expressed, the Working Group felt that the substance of the draft article, possibly within square brackets, should be retained for further consideration by it at a later stage. In that connection, it was agreed that the addressees of the disclosure obligations in the draft article should be redefined in accordance with the Working Group's deliberations on draft article 7, paragraph 1 (see paras. 43-50). It was further agreed that some of the concerns that had been expressed in connection with the draft article might be addressed if the relationship between the draft article and draft article 7, paragraph 1, could be clarified in a revised version of the draft article. The Secretariat was requested to prepare such a revised draft taking into account the comments that had been made in the course of the Working Group's deliberations.

Article 8. Time of contract formation

66. The text of the draft article, as considered by the Working Group, read as as follows:

"1. A contract is concluded at the moment when the acceptance of an offer becomes effective in accordance with the provisions of this Convention.

"2. An offer becomes effective when it is received by the offeree.

"3. An acceptance of an offer becomes effective at the moment the indication of assent is received by the offeror."

General remarks

67. It was explained, at the outset, that draft article 8 was intended to reflect the essence of the rules on contract formation contained, respectively, in articles 23, 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb "reach", which was used in the United Nations Sales Convention, had been replaced with the verb "receive" in the draft article so as to align it with draft article 11, which was based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

68. It was observed that the scope of the rules embodied in draft article 8 went beyond electronic contracting to cover the time when any form of a contractual offer or acceptance would become effective. Diverging views were expressed regarding the scope and nature of the legal issues linked to contract formation that should be dealt with in the draft instrument. One view was that the provision should be broadened beyond determining when an offer or an acceptance became "effective" to discuss such issues as the legal regime of withdrawal, revocation or modification of an offer or acceptance, the place of

contract formation, issues of contracts concluded by conduct and, more generally, all the issues dealt with in articles 14-24 (Part II) of the United Nations Sales Convention. Strong support was expressed in favour of that view. It was pointed out that practitioners of international trade transactions would regard it as particularly desirable and timely to be able to rely on a set of uniform legal provisions regarding those issues upon which the various domestic laws in existence offered little harmony.

69. The opposing view was that draft article 8 should be deleted since it did not specifically address the issues of electronic contracting to which the draft instrument should confine itself. Strong support was expressed in favour of the view that, even if the provisions contained in draft article 8 were redrafted so as to be limited in scope to electronic commerce transactions, they should still be deleted to avoid the creation of a dual regime where different rules would govern the time of formation of an electronic commerce contract within the draft instrument and the time of formation of other types of contract outside the purview of the draft instrument. As to the determination of the time of contract formation, it was stated that the issue was adequately dealt with by draft article 11. Also in favour of deletion of draft article 8, it was stated that no attempt should be made to provide a rule on the time of contract formation that deviated from the substance of the United Nations Sales Convention. In that context, it was pointed out that replacing the verb "reach" with the verb "receive" might lead to unforeseen consequences, for example regarding the compatibility with the draft instrument of domestic laws under which a contract would typically be formed when the offeror became aware of the acceptance of the offer (a theory known as contract formation through "information" of the offeror, as opposed to the mere "receipt" of the acceptance by the offeror). It was pointed out in response that the purpose of draft article 8 was not to deviate from the regime established under the United Nations Sales Convention but merely to provide a synthesis of its most essential provisions regarding contract formation.

70. The Working Group maintained its working assumption that it should limit itself to dealing with the use of data messages in the context of international commercial contracting. In view of the support expressed for the preparation of an instrument dealing broadly with the issues of contract formation, it was observed that the Commission at its forthcoming session might wish to discuss the desirability and feasibility of preparing such an instrument.

Paragraph 1

71. In the continuation of its deliberations, the Working Group focused on the individual paragraphs of draft article 8. Strong support was expressed in favour of retaining paragraph 1, which was described as an essential provision in that draft article and its only substantive addition to the text of the UNCITRAL Model Law on Electronic Commerce. Equally strong support was expressed in favour of deletion of the draft paragraph on the assumption that no interference should be made with the general law applicable outside the draft instrument regarding the time of contract formation. The prevailing view was that paragraph 1 should be replaced with a provision along the lines of draft article 10. As to the notion that a contract would be formed upon receipt of the acceptance, it was agreed that it could be reflected in the other paragraphs of draft article 8, for example in paragraph 3. At the close of the discussion, the view was reiterated that language drawn from draft article 10 was insufficient to provide the guidance and harmonization expected by practitioners as to how contracts were concluded.

Paragraphs 2 and 3

72. General agreement was expressed with respect to the substance of paragraphs 2 and 3. As a matter of drafting, it was widely felt that, since offer and acceptance were abstract notions and the purpose of paragraphs 2 and 3 was to solve the difficulty of determining a point in time at which the intent of the parties expressed by way of data messages would become effective as offer or acceptance, paragraphs 2 and 3 should refer to the specific medium or instrument through which the parties' intent would be manifested. Accordingly, paragraph 2 should be redrafted along the lines of: "An offer in the form of a data message becomes effective when the data message is received by the offeree." Paragraph 3 should read along the lines of: "When expressed in the form of a data message, an acceptance of an offer becomes effective at the moment the data message is received by the offeror."

73. The view was reiterated that, in order not to deviate or run the risk of being interpreted differently

from the text of the United Nations Sales Convention, draft article 8 should reproduce the remainder of Part II of that Convention. The Working Group took note of that view.

Article 9. Invitations to make offers

74. The text of the draft article, as considered by the Working Group, read as follows:

"1. A proposal for concluding a contract which is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.

"2. In determining the intent of a party to be bound in case of acceptance, due consideration is to be given to all relevant circumstances of the case. Unless otherwise indicated by the offeror, the offer of goods or services through automated computer systems allowing the contract to be concluded automatically and without human intervention is presumed to indicate the intention of the offeror to be bound in case of acceptance."

75. The Working Group noted that the draft article, which was inspired by article 14, paragraph 1, of the United Nations Sales Convention, was intended to clarify an issue that had raised a considerable amount of discussion since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet web site, were bound by advertisements made on their web site.

Paragraph 1

76. There was general support within the Working Group for the policy underlying the draft paragraph. It was noted that, in a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, were generally regarded as invitations to submit offers (according to some legal writers, even in those cases where they were directed to a specific group of customers), since in such cases the intention to be bound was considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves was usually regarded as an invitation to submit offers. That solution was the result of the application of article 14, paragraph 2, of the United Nations Sales Convention, which provided that a proposal other than one addressed to one or more specific persons was to be considered as merely an invitation to make offers, unless the contrary was clearly indicated by the person making the proposal.

77. The Working Group was of the view that, in keeping with the principle of media neutrality, the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. The Working Group was therefore agreed that, as a general rule, a company that advertised its goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.

78. Having essentially approved the substance of the draft paragraph, the Working Group considered proposals for clarifying further its scope of application. Consistent with its earlier decisions on focusing on issues particularly related to the use of data messages for electronic transactions, the Working Group agreed that the draft paragraph should be reformulated so as to avoid the impression that it contained a general rule on contract formation.

Paragraph 2

79. In response to a question it was noted that the first sentence of the draft paragraph reproduced some but not all of the elements of the rules on interpretation of statements and conduct of the parties that were contained in article 8 of the United Nations Sales Convention. It was suggested, in that connection, that, while there might be reasons for not reproducing the entirety of article 8 of the United Nations Sales Convention in the narrower context of the draft paragraph, it might be preferable to delete the first sentence of the draft paragraph so as to avoid uncertainty as to the relationship between the draft convention and the United Nations Sales Convention.

80. The Working Group noted that the second sentence of the draft paragraph established a

presumption whereby a party offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services might be regarded as making a binding offer, unless it clearly indicated its intention not to be bound. That presumption was the object of both support and criticism within the Working Group.

81. Arguments in favour of the presumption underscored the belief that the draft provision helped enhance legal certainty in international transactions. It was stated that parties acting upon offers of goods or services made through the types of system contemplated in the draft paragraph might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it was said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for securities, commodities or other items with highly fluctuating prices. A rule similar to the one contained in the draft paragraph, it was further said, might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers.

82. The countervailing view was that the rules contained in the draft paragraph might give rise to various difficulties in its interpretation and application. A presumption of the type contemplated in the draft paragraph might have serious consequences for the offeror holding a limited stock of certain goods if it were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers. It was pointed out that, in order to avert that risk, entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that was already the case in practice, it would be questionable for the Working Group to reverse that situation in the draft provision. Furthermore, it was said that the party placing an order might have no means of ascertaining how the order would be processed and whether it was in fact dealing with "automated computer systems allowing the contract to be concluded automatically" or whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order. The formulation in the draft paragraph was further criticized because the words "allowing the contract to be concluded automatically", which appeared to assume that a valid contract had been concluded, were felt to be misleading in a context dealing with actions that might lead to contract formation.

83. The Working Group considered at length the various views that had been expressed and agreed that the matters raised by the draft paragraph required further consideration by the Working Group. In order to advance its future review of the matter, the Working Group requested the Secretariat to prepare a revised draft of paragraph 2 that contained two alternative options for the presumption in question: one confirming the binding character of the offers contemplated in that provision and another treating them as invitations to make offers.

84. The Secretariat was further requested to prepare another variant of the entire draft paragraph that should be drawn essentially from a combination of elements of paragraph 1 and the second sentence of paragraph 2, in which the offer of goods or services through web sites using interactive applications would be presented as an illustration of situations involving only an invitation to make offers.

85. In reformulating the draft paragraph, the Secretariat was requested to ensure that the text was focused on issues of electronic contracting and avoid unnecessary repetition of language drawn from the United Nations Sales Convention.

Article 10. Use of data messages in contract formation

86. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance, including, but not limited to, touching or clicking on a designated icon or place on a computer screen].

"2. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose."

87. The Working Group noted that, as a result of its deliberations on draft article 8, the rules contained in the draft article might need to be reformulated and, at least in part, combined with the current draft article 8 (see paras. 66-73). Without prejudice to those deliberations, the Working Group proceeded to consider the substance of the draft article.

Paragraph 1

88. The Working Group noted that the rules contained in the draft article were based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce. The phrase "or other actions communicated electronically", and the reference, for illustrative purposes, to "touching or clicking on a designated icon or place on a computer screen", it was said, were intended to clarify, rather than expand the scope of the rule contained in the Model Law.

89. In connection with the sentence in square brackets, the view was expressed that the illustrative reference to indication of assent by "touching or clicking on a designated icon or place on a computer screen" was not consistent with the principle of technological neutrality and that it carried the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned therein might already be in use or might possibly become widely used in the future. Thus, it was suggested that those words should be deleted from the draft paragraph. An alternative proposal, in that respect, was that the phrase in question be added to the definition of "data messages" in draft article 5, if such illustration was deemed to be useful. The prevailing view within the Working Group, however, was that any of the actions mentioned in that phrase would in fact generate a data message, and that, given the broad meaning of the latter expression in the draft convention, the proposed illustrative addition was not needed in the text of the draft convention. The same conclusion, it was said, might apply to the remainder of the sentence in square brackets.

Paragraph 2

90. A suggestion was made that the draft paragraph was excessively narrow in scope, since it applied only to data messages used in the context of contract formation. It was proposed that the draft paragraph be expanded so as to encompass other messages that might be used in the context of the performance or the termination of a contract. That proposal was objected to on the grounds that there might be situations where domestic law might require certain notices related to contract formation or termination to be made in writing. An example of such requirements might be notices of termination of loan agreement, which, pursuant to rules on debtor protection of some jurisdictions, were not admissible in any form other than a notice written on paper. An international convention such as the one under consideration, it was said, should not interfere with the operation of those rules of domestic law.

91. A proposal was made that the rule contained in the draft paragraph be qualified by a clause indicating that the draft paragraph was subject to draft article 13, which referred to requirements of written form imposed by the law. In response to that proposal it was pointed out that the draft paragraph contained a non-discrimination rule of paramount importance to remove legal obstacles to the use of data messages and that it was essential, in that respect, to reproduce faithfully the substance of the relevant portion of article 11 of the UNCITRAL Model Law on Electronic Commerce, without suggesting a subordination to possible requirements of written form.

92. Having considered both the proposed expansion and qualification to the draft paragraph, as well as the objections thereto, the Working Group agreed, for the time being, to retain the scope of the draft paragraph as currently formulated until it had fully considered the scope of application of the draft convention, in particular the exclusions under draft article 2 at its fortieth session (see para. 15).

Article 11. Time and place of dispatch and receipt of data messages

93. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an

information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

"2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, [the data message is deemed to be received] at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

"3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

"4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.

"5. Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7."

94. The deliberations of the Working Group were focused on draft paragraph 2, which was criticized for being overly complex and for containing an excessive level of detail. From a substantive point of view, it was suggested that a rule on receipt of data messages that focused on the moment when a data message entered a given information system was said to be excessively rigid and insufficient to ensure that the addressee had actual knowledge of the message. It was said that the fact that a message had entered the addressee's system or another system designated by the addressee might not always allow the conclusion that the addressee was capable of accessing the message. The rule contained in draft paragraph 2 should be rendered more flexible by adding the notion of accessibility of the data message to the elements mentioned in the draft paragraph.

95. One line of thought in that connection was that the rules set forth in the draft paragraph were substantially acceptable, but that the first and the last sentence of the draft paragraph needed further qualification by adding language such as "and the data message comes to the attention of the addressee". Such an addition, it was said, might address situations where the message was not capable of being accessed by the addressee for reasons beyond the addressee's control, such as interruption or unavailability of access by the addressee to the information system.

96. Another line of thought was that it would be preferable to replace the entire paragraph 2, and possibly paragraphs 3-5 as well, with a shorter provision to the effect that a data message was deemed to be received if the message was capable of being retrieved and processed by the addressee.

97. While there was wide and strong support for the latter proposal, the Working Group also heard strong objections thereto. It was pointed out that the entire draft paragraph was based on article 15 of the UNCITRAL Model Law on Electronic Commerce and that care should be taken to avoid inconsistencies between the two texts. As currently formulated, the rules contained in the draft paragraph were felt to replicate, in an electronic environment, the tests used for dispatch and receipt of paper-based communications, namely, the moment when the communication left the sphere of control of the sender and the moment when it entered the sphere of control of the recipient. The notion of "entry" into an information system, which was used for both the definition of dispatch and that of receipt of a data message, referred to the moment when a data message became available for processing within an information system. The rules in the draft paragraph were said to be essentially intended to establish functional equivalence, but not to develop particular rules for electronic commerce. For that reason, it was said to be undesirable to craft the rules on the basis of the time when a message became intelligible or usable by the addressee. Those issues should remain outside the purview of the draft convention. Furthermore, it was said that paragraph 2 contained an important rule allowing the parties to designate a specific information system for receiving certain communications, for

instance, where an offer expressly specified the address to which acceptance should be sent. Such a possibility was said to be of great practical importance, in particular for large corporations using various communications systems at different places.

98. The Working Group considered at length the differing views that were expressed. While a broadly held view was in favour of replacing draft paragraph 2 with a more general rule based on the notion of accessibility of a data message, the Working Group agreed that the matter required further consideration and decided that the current text of the draft paragraph should be kept in square brackets, as an alternative to a new paragraph to be prepared by the Secretariat. In preparing an alternative draft, the Secretariat was requested to include language that broadened the scope of the draft provisions so as to encompass other commercial communications beyond offers and acceptances.

Article 12. Automated transactions

99. The text of the draft article, as considered by the Working Group, read as follows:

"1. Unless otherwise agreed by the parties, a contract may be formed by the interaction of an automated computer system and a natural person or by the interaction of automated computer systems, even if no natural person reviewed each of the individual actions carried out by such systems or the resulting agreement.

"2. Unless otherwise [expressly] agreed by the parties, a party offering goods or services through an automated computer system shall make available to the parties that use the system technical means allowing the parties to identify and correct errors prior to the conclusion of a contract. The technical means to be made available pursuant to this paragraph shall be appropriate, effective and accessible.

"[3. A contract concluded by a natural person that accesses an automated computer system of another person has no legal effect and is not enforceable if the natural person made a material error in a data message and:

"(a) The automated computer system did not provide the natural person with an opportunity to prevent or correct the error;

"(b) The natural person notifies the other person of the error as soon as practicable when the natural person learns of it and indicates that he or she made an error in the data message;

"(c) The natural person takes reasonable steps, including steps that conform to the other person's instructions to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

"(d) The natural person has not used or received any material benefit or value from the goods or services, if any, received from the other person.]"

General comments

100. Questions were raised as to the practical need for regulating automated transactions specifically. It was stated that the issues regulated in draft article 12 were already, or should be, answered in other draft articles. It was said that, in practice, it might be problematic to distinguish automated transactions from semi-automated and non-automated transactions.

101. The Working Group took note of those views and was mindful of the conceptual difficulties related to the notion of "automated computer system", as used in the draft article, and of the need to avoid formulating rules on errors in an electronic environment that departed from the rules that applied in corresponding situations in a paper-based environment.

Paragraph 1

102. The Working Group noted that the draft paragraph developed further a principle formulated in general terms in article 13, paragraph 2 (b), of the UNCITRAL Model Law on Electronic Commerce. The draft paragraph, it was pointed out, was not intended to innovate on the current understanding of legal effects of automated transactions, as expressed by the Working Group (see A/CN.9/484, para. 106), that a contract resulting from the interaction of a computer with another computer or person was attributable to the person in whose name the contract was entered into.

103. Subject to replacing the words "natural person" with the word "person" and "automated computer system" with "automated information system", the Working Group was of the view that the substance of the draft paragraph was generally acceptable.

Paragraphs 2 and 3

104. The Working Group held an extensive discussion on the need for and desirability of formulating specific rules to address mistakes and errors made by persons when dealing with automated computer systems.

105. There were expressions of strong support for including provisions dealing with errors in electronic transactions. There was a need for such a specific provision in the light of the relatively higher risk of human errors being made in online transactions made through automated information systems than in more traditional modes of contract negotiation. The need for specific provisions was even greater since errors made by the parties in those situations might become irreversible once acceptance was dispatched.

106. The countervailing view was that the provisions under consideration might interfere with well-established notions of contract law and were not appropriate in the context of the new instrument. It was said that the provisions along the lines of draft paragraph 2 and, even more so, draft paragraph 3, carried the risk of creating a duality of regimes on the legal consequences of mistake and error for electronic and non-electronic environments.

107. The prevailing view within the Working Group was that it would be useful to address the issue of errors and mistakes in electronic transactions. For purposes of clarity, such provisions should preferably appear in a separate article of the draft convention. The Working Group then proceeded to consider specific comments that were made in respect of paragraphs 2 and 3.

108. Various speakers expressed the view that draft paragraph 2 was of a regulatory or public law nature and that, as such, it was not appropriate for the draft convention to contain such a provision. Typically, an obligation for persons offering goods or services through automated information systems to offer means for correcting input errors could only be effective if sanctions of an administrative or regulatory nature were provided for non-compliance with such an obligation. As the draft paragraph did not, and by its very nature could not, provide such a system of sanctions, it would be preferable to delete the provision.

109. The countervailing view, which eventually prevailed, was that the draft paragraph was a useful provision to encourage best practices in electronic transactions and that the provision should be retained in the draft convention. Although provisions of that type might be found in consumer protection legislation, the prevailing view within the Working Group was that they could be appropriate in a business-to-business context as well. Furthermore, the draft paragraph could not be regarded as being overly prescriptive since it expressly recognized the parties' freedom to deviate from its provisions. Some of the concerns that had been expressed, it was suggested, could be addressed by reformulating the draft paragraph to express more clearly the logical relationship between draft paragraphs 2 and 3, which established a sanction of a private law nature.

110. With regard to draft paragraph 3, it was suggested that such a provision might not be appropriate in the context of commercial (i.e. non-consumer) transactions, since the right to repudiate a contract in case of material error might not always be provided under general contract law. Adopting a solution along the lines of the draft paragraph might interfere with well-established principles of domestic law. The use of automated information systems alone was not felt to be a sufficient reason to that end. Also, subparagraphs (c) and (d) were felt to go beyond matters of contract formation and depart from the consequences of avoidance of contracts under some legal systems. The prevailing view within the Working Group, however, was that a provision providing a harmonized solution for dealing with the consequences of errors in electronic transactions had great practical importance and was needed in the draft convention. The fact that the provision dealt with the validity of contracts was said to be consistent with draft article 3.

111. Nevertheless, the Working Group considered that the notion of "material error" in the draft paragraph needed to be clarified. Furthermore, the Working Group agreed that a revision of the draft paragraph to be prepared by the Secretariat could provide a second variant of draft paragraph 2 for which some of the substance of subparagraph (a) might be used. It was suggested that subparagraphs (c) and (d) could be combined under another paragraph, as a further alternative for consideration by the Working Group.

Article 13. Form requirements

112. The text of the draft article, as considered by the Working Group, read as follows:

"1. Nothing in this Convention requires a contract to be concluded in or evidenced by writing or subjects a contract to any other requirement as to form.

"2. Where the law requires that a contract to which this Convention applies should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

Variant A

"3. Where the law requires that a contract to which this Convention applies should be signed, that requirement is met in relation to a data message if:

"(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

"(b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement."

Variant B

"3. Where the law requires that a contract to which this Convention applies should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

"4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 if:

"(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

"(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

"(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

"(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

"5. Paragraph 4 does not limit the ability of any person:

"(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3, the reliability of an electronic signature;

"(b) To adduce evidence of the non-reliability of an electronic signature."

113. It was observed that draft article 13 combined essential provisions on form requirements of the United Nations Sales Convention (art. 11) with provisions of articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce. Paragraph 1 restated the general principle of freedom of form contained in article 11 of the United Nations Sales Convention. Paragraph 2 set forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce. Variant A stated the general criteria for the functional equivalence between handwritten signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce. Variant B was based on article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures. It was pointed out that, in contrast with the structure adopted in article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce, possible exclusions of certain fact situations from the scope of draft article 13 were not dealt with by way of a general provision in that draft article. Such possible situations where traditional form requirements might need to be maintained were intended to be dealt with under draft article 2. The view was expressed that a different approach should be taken, by way of a reproduction in the draft instrument of article 96 of the United Nations Sales Convention. It was generally felt, however, that creating a possibility

for contracting States whose legislation required contracts to be concluded in or evidenced by writing to make a declaration to the effect of avoiding application of the more liberal rule embodied in draft article 13 would be excessively complex. It was agreed that the matter might need to be further discussed in the context of draft article 2.

Paragraph 1

114. While the policy on which paragraph 1 was based met with wide approval, doubts were expressed as to the usefulness of expressly stating in the draft convention a rule that, in the view of a number of delegations, merely restated the obvious, duplicated certain provisions of draft articles 10 and 12 and provided little harmonizing effect. The view was expressed that paragraph 1 would serve a useful purpose if it were to be interpreted as confirming that it was up to domestic legislation to establish general form requirements regarding contract formation. Support was expressed in favour of that interpretation, which was said to confirm that it was unnecessary to resort to a declaration mechanism such as the one created by article 96 of the United Nations Sales Convention.

115. The prevailing view, however, was that paragraph 1 was useful and should be retained in square brackets, pending further consideration by the Working Group at a later stage. As a matter of drafting, doubts were also expressed regarding the merit of reproducing part of article 11 of the United Nations Sales Convention. It was pointed out that the reference to "writing" in that Convention was understandable since it had been drafted at a time when writing was the main form requirement likely to be imposed in contract-making. It was suggested that the draft instrument should instead adopt a formulation more in line with current contractual practices along the lines of "nothing in this Convention requires a contract to be concluded or evidenced [in a particular form] [by data messages or in any other form]". After discussion, the Working Group agreed that the suggested wording should be reflected in a future redraft of paragraph 1.

Paragraph 2

116. The substance of paragraph 2 was found generally acceptable. Questions were raised regarding the exact meaning of the reference to "the law", which might require a contract to be in writing, and also regarding the meaning of the words "in writing". It was suggested that those issues might need to be discussed further in the context of draft article 5. The suggestion was noted by the Working Group.

117. The view was expressed that, while the result expected from paragraph 2 could also be reached through interpretation of existing domestic law, more serious difficulties might stem from writing requirements contained in multilateral instruments. It was observed that the matter might need to be discussed further in the context of item 5 of the agenda.

Paragraph 3

118. Support was expressed in favour of either variant A or B. In favour of variant B, it was pointed out that the text was more detailed and more apt than variant A to provide legal certainty with respect to the use of electronic signatures. In support of variant A, it was stated that the text contained a more flexible provision than variant B, that it could more easily be made consistent with the stricter requirements that might exist in domestic legislation regarding the characteristics of an electronic signature and that it was more reflective of the principle of technology neutrality.

119. A widely shared view was that variant A should be retained, pending future discussion regarding the definition of "data message" in draft article 5. It was stated that the minimal harmonization that could be expected from variant A was sufficient to reduce the risk linked with the application of foreign electronic signature legislation. Another view was that neither of the variants was necessary if the main purpose of the draft instrument was to deal with contract formation. It was stated by its proponents that this view might be reconsidered if the Working Group decided that an important purpose of the draft instrument was to provide a version of the UNCITRAL Model Laws on Electronic Commerce and on Electronic Signatures in the form of a convention. Yet another view that gathered some support was that the two variants could be combined, with variant A applying as the smallest common denominator where States had already adopted electronic signature legislation and variant B applying where no such domestic legislation existed. It was pointed out in response that such a combination

would result in undesirable duality of the legal regimes applicable. Furthermore, it was observed that combining the two variants would amount to adopting variant B, which reproduced and built upon the text of article 6 of the UNCITRAL Model Law on Electronic Commerce reproduced as variant A.

120. As a matter of drafting, it was pointed out that, should variant A be retained, words along the lines of "or provides consequences for the absence of a signature" should be inserted. With respect to both variants, it was pointed out that the reference to legal requirements with regard to "a contract" was too restrictive and should be extended to cover also pre- and post-contractual "communications", "statements" or "manifestations of will" between the parties using data messages.

121. After discussion, the Working Group did not reach agreement regarding either of the variants. The Secretariat was requested to prepare a revised version of draft article 13, with possible alternative wordings, taking into account the various views and suggestions that had been expressed.

Article 15. Availability of contract terms

122. The text of the draft article, as considered by the Working Group, read as follows:

"A party offering goods or services through an information system that is generally accessible to the public shall make the data message or messages which contain the contract terms and general conditions available to the other party for a reasonable period of time in a way that allows for their storage and reproduction. A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party."

123. The view was expressed that, for reasons expressed in the context of the discussion regarding draft articles 14 and 12, draft article 15 should be deleted. It was stated that it was pointless to establish regulatory provisions in the draft instrument, in particular if no sanction was created. In favour of deletion, it was also stated that draft article 15 would result in imposing rules that did not exist in the context of paper-based transactions, thus departing from the policy that the draft instrument should not create a duality of regimes governing paper-based contracts on the one hand and electronic transactions on the other. The widely prevailing view, however, was that the general policy embodied in the draft article should be retained, since it addressed specifically an element that was particularly important in the context of electronic contracts. It was agreed that further consideration might be needed in respect of the consequences of non-compliance with draft article 15. Possible consequences such as the nullity of the contract or the non-incorporation of the general terms and conditions in the contract were mentioned.

124. With respect to the formulation of draft article 15, it was suggested that the words "for a reasonable period of time" should be deleted since the obligation to make the general conditions available to the public should not be limited in time. With respect to the last sentence, doubts were expressed as to whether such a "deeming" provision was sufficiently flexible to allow for the creation of "original" or "unique" electronic documents, which might sometimes be obtained through inhibition of the capacity of reproducing the electronic document. It was also suggested that further discussion might be necessary to determine whether the second sentence was needed in view of the requirement contained in the first sentence of the draft article, which would simply not be met in the situation considered under the second sentence.

125. After discussion, the Working Group requested the Secretariat to prepare a revised version of draft article 15, based on the above discussion, to be placed between square brackets for continuation of the discussion at a future session.

Notes

[1] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[2] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

[3] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 293.

[4] Ibid., para. 295.